

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
GARB-KO)	
d/b/a 7-ELEVEN STORE #229)	PERMIT NO. DL49-21523
5820 W. 56th STREET)	
INDIANAPOLIS, INDIANA 40254)	
)	
Applicant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The Applicant, Garb-Ko, Inc., d/b/a 7-Eleven Store #229 (“Applicant” or “Store #229”), located at 5820 West 56th Street, Indianapolis, Indiana 46254, permit number DL49-21523, is the applicant for a type 116 Alcohol and Tobacco Commission (“Commission” or “ATC”) permit. The application was assigned to the Marion County Local Alcoholic Beverage Board (“Local Board”). On March 21, 2005, the Local Board heard the application request and on that same day, voted 4-0 to deny the application. The Commission adopted the Local Board’s recommendation on April 6, 2005.

The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript, video tape transcript of the Local Board hearing (“Local Board Hearing”), the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), contents of the entire Commission file (“ATC File”), and the evidence submitted subsequent to the appeal hearing, now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission.

II. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Salah Bukhari (“Bukhari”), Manager of 7-Eleven Store #229 and Regional Manager for Garb-Ko stores in Central Indiana area;
2. Don Kinnan (“Kinnan”), Private Investigator, Advanced Research Services;
3. Richard C. Hersberger (“Hersberger”), Attorney, Smyth Brazill Hester, LLP.

B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

1. G LB Exhibit 1 – Aerial photo of West 56th Street and Lafayette Road, demonstrating the 500-foot radius around the subject location;
2. G LB Exhibit 2 – Summary of acreage by lot to show commercial/residential breakdown of immediate area;
3. G LB Exhibit 3 – Names of owners of all lots within 500-foot radius;
4. G LB Exhibit 4 – Indiana Certificate of Authorization for Garb-Ko;
5. G LB Exhibit 5 – Certificate of Good Standing from Michigan Department of Consumer and Industry Services for Garb-Ko;
6. G LB Exhibit 6 – Certificate of Good Standing from Michigan Department of Consumer and Industry Services for Grad, Inc.;
7. G LB Exhibit 7A – Documentation of no arrests of Daniel Abraham;
8. G LB Exhibit 7B – Documentation of no arrests of Salah Bukhari;
9. G LB Exhibit 8 – Articles of Incorporation for Garb-Ko;
10. G LB Exhibit 9 – Photographs of interior of 7-Eleven Store #229 and photographs of exterior and surrounding area of 7-Eleven Store #229;
11. G LB Exhibit 10 – “Come of Age” training materials showing self-imposed safeguards against selling alcohol to minors or inebriated individuals;
12. G LB Exhibit 11 – Letter dated May 17, 2004, from the Michigan Liquor Control Commission to Garb-Ko;
13. G LB Exhibit 12 – Floor plan of 7-Eleven Store #229;
14. G LB Exhibit 13 – Internal documents of Garb-Ko, showing sales figures related to grocery items in January 2005.

C. The following individuals testified before the Local Board against the Applicant in this cause:

1. Ray Cox, President, Indiana Association of Beverage Retailers;
2. Susan Blair, President, Pike Township Residents’ Association;
3. Judy Aikman, Chairperson, Eagle Creek Park Citizens’ Advisory Committee.

D. The following evidence was introduced and admitted before the Local Board against the Applicant:

1. R LB Exhibit 1 – Packet containing map of subject location showing area schools, current permit holders, and potential future permit holders; letters to the Local Board opposing the grant of a permit to Applicant; a petition signed by individuals opposing the grant of a permit to Applicant; and Indianapolis City-County Council Resolution No. 32, 2003 - Proposal No. 1, 2003;
2. R LB Exhibit 2 – Letter from Jeanette Robertson; and
3. R LB Exhibit 3 – Indiana Code Section 7.1-3-5-2 and two (2) pages of NAICS definitions.

III. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Donna Dickinson, Smyth Brazill Hester, LLP.;
2. Larry Hauck, Director of Marketing, Garb-Ko;
3. Joe Lackey, President, Indiana Grocers and Convenience Stores Association, Inc.

B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. G ATC Exhibit 1 – Video Tape of Marion County Local Board Hearing on March 21, 2005;
2. G ATC Exhibit 2 – 1997 Digest of Enactments of the Indiana General Assembly, and the 1997 Enrolled Acts Summary, showing House Enrolled Act 1949 was effective on May 13, 1997;
3. G ATC Exhibit 3 – Photocopy of Permit of 7-Eleven Store on Rockville Road issued on June 20, 1997;
4. G ATC Exhibit 4 – Petition signed by individuals supporting the grant of a permit to Applicant;
5. G ATC Exhibit 5 – List of grocery product selection specific to store presented by Larry Hauck;
6. G ATC Exhibit 6 – The 7-Eleven Store's retail dollar sales from January 1 through the end of August of 2005, broken down by sales as to product category (% of sales by category);
7. G ATC Exhibit 7 – Come of Age training materials;
8. G ATC Exhibit 8 – Store layout;
9. G ATC Exhibit 9 – 7-Eleven advertisement.

C. The following individuals testified before the Commission against the Applicant in this cause:

1. Susan Blair, President, Pike Township Residents Association;
2. Jeanette Robertson, Board Member, Pike Township Residents Association;
3. Mary Walker, Marion County Alliance of Neighborhood Associations;

4. Michael W. Warrick, Eagle Creek Park Foundation and Advisory Board;
5. Jim Easley, Eagle Creek Park Foundation.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

1. R ATC Exhibit 1 – Letter read into evidence by Michael W. Warrick, representing the Eagle Creek Park Foundation;
2. R ATC Exhibit 2 – Chart of property owners;
3. R ATC Exhibit 3 – Map with same information as R ATC Exhibit 2 shown in proximity in this business;
4. R ATC Exhibit 4 – Letter from George and Norma Rosh;
5. R ATC Exhibit 5 – Letter from Larry and Becky Hatfield (Carpenter Realtors);
6. R ATC Exhibit 6 – Letter from resident Jill Lewis;
7. R ATC Exhibit 7 – Two (2) pages of petitions;
8. R ATC Exhibit 8 – Letter from Loretta Swank;
9. R ATC Exhibit 9 – Letter from Lafayette Village Homeowner’s Association;
10. R ATC Exhibit 10 – Letter from Greg Bose, City-County Council;
11. R ATC Exhibit 11 – Letter from Paul Nawa, resident of Deer Creek;
12. R ATC Exhibit 12 – Four (4) page petition signed by individuals opposing the grant of a permit to Applicant;
13. R ATC Exhibit 13 – Definition of what a convenience market is from the Commercial Zoning Ordinance of Marion County;
14. R ATC Exhibit 14 – Three (3) pages, consisting of two (2) pages from the Pike Township Assessor’s Office, including information from property card; and one (1) page which is an Indianapolis custom map – an aerial photo of store location;
15. R ATC Exhibit 15 – Section 210 of street parking regulations;
16. R ATC Exhibit 16 – Photocopy of G ATC Exhibit 3 with handwritten notation that Garb-Ko’s attorneys picked up the Rockville Road permit on July 1, 1997.

IV. FINDINGS OF FACT

1. The Applicant, Garb-Ko, d/b/a 7-Eleven Store #229, located at 5820 West 56th Street, Indianapolis, Indiana 46254, permit number DL49-21523, is the applicant for a type 116 Alcohol and Tobacco Commission permit. (ATC File).
2. Applicant operates three (3) identical convenience stores in Indiana that hold ATC beer and wine permits. (ATC records).
3. Applicant sells products typically sold in Indiana grocery stores, including baked goods, dairy products, milk, cheese, cereal, canned foods, bread, health and beauty aids,

toiletries, juices, soft drinks, paper products, chips, candy, and frozen foods. (Local Board Hearing; ATC Hearing).

4. Applicant advertises grocery items that are sold on the premises of 7-Eleven Store #229. (ATC Hearing).

5. Applicant has provided detailed evidence and testimony to indicate that the inventory and grocery sales at Store #229 are greater than 25% and are a substantial and significant part of the business operation of Store #229. (Local Board Hearing; ATC Hearing).

6. Applicant is qualified under USDA guidelines and directives to apply for the authority to redeem food stamps. (ATC Hearing; Testimony of Joe Lackey).

7. Grocers are the only business that is required by the government to segregate taxable and non-taxable items, and Store #229 is required to segregate taxable and non-taxable items. (ATC Hearing; Testimony of Joe Lackey).

8. The Marion County Alliance of Neighborhood Associations opposes the granting of alcoholic beverage permits to all convenient stores that sell gasoline. (Testimony of Mary Walker). The law, however, does not allow denial of a permit for the reason that a prospective applicant sells gasoline. The fact that this Applicant sells gasoline is irrelevant to the consideration of whether it qualifies as a grocery store for the purposes of obtaining an alcoholic beverage permit. The fact of the matter is, the Commission has, over the years, granted a number of alcoholic beverage permits to other businesses that sell gasoline. *See In the Matter of the Permit of Gas City, Ltd.*, Permit No. DL46-19843 (Dist. 1, 2003); *In the Matter of the Permit of American Oil Company*, Permit No. DL49-18873 (Dist. 6, 2005); *In the Matter of the Permit of American Oil Company*, Permit No. DL49-18879 (Dist. 6, 2005); *In the Matter of the Permit of American Oil Company*, Permit No. DL41-18884 (Dist. 6, 2002); *In the Matter of the Permit*

of Casey's Enterprises, LLC, Permit No. DL34-20256 (Dist. 2, 2004); *In the Matter of the Permit of Casey's Enterprises, LLC*, Permit No. DL34-20253 (Dist. 2, 2004); *In the Matter of the Permit of Mac's Convenient Store*, Permit No. DL79-21223 (Dist. 3, 2005); *In the Matter of the Permit of Casey's Enterprises, LLC*, Permit No. DL34-20757 (Dist. 5, 2005).

9. Applicant has an excellent record of complying with Indiana's alcoholic beverage laws, having never received a citation in connection with the operation of its stores in Indiana. (ATC File).

10. Applicant has intensive internal procedures, including but not limited to the Come of Age program, for ensuring compliance with Indiana's alcoholic beverage laws and Applicant's strict policies on sales of alcohol to minors or inebriated persons. (Local Board Hearing; ATC Hearing).

11. Applicant has experienced no problems with increased criminal activity, loitering, theft, or police activity at its three (3) locations in Indiana that sell alcoholic beverages. (Local Board Hearing; ATC Hearing).

12. Store #229 has been in operation at 5820 West 56th Street, Indianapolis, Indiana 46254 for approximately twelve (12) years. (ATC Hearing).

13. There are four (4) competing stores that sell alcoholic beverages within a 3-mile radius of the proposed location, evidencing a desire for the services at the location. (Local Board Hearing; ATC Hearing).

14. No objections made by the remonstrators were directed in any way at the moral character of the Applicant or its contribution to the community. (Local Board Hearing; ATC Hearing).

15. Remonstrance provided no evidence that the Applicant would sell alcohol to

minors or inebriated persons. (Local Board Hearing; ATC Hearing).

16. At Store #229, customers have indicated a desire to purchase alcohol at that location. (Local Board Hearing; ATC Hearing; G ATC Exhibit 4)

17. Local residents and businesses have indicated that they do not desire or need another alcoholic beverage outlet. (Local Board Hearing; ATC Hearing; R ATC Exhibit 1; R ATC Exhibit 4; R ATC Exhibit 5; R ATC Exhibit 6; R ATC Exhibit 7; R ATC Exhibit 8; R ATC Exhibit 9; R ATC Exhibit 10; R ATC Exhibit 11; R ATC Exhibit 12).

18. Applicant is committed to meeting the desires of its customers and the community at large insofar as a diminution of desire for alcoholic beverages at Store #229 would lead Applicant to discontinue carrying such products. (Local Board Hearing; ATC Hearing).

19. Store #229 employs extensive security policies, procedures, and equipment. . (Local Board Hearing; ATC Hearing).

20. A permit is available for the proposed location and the Applicant meets all administrative requirements for the permit. (Local Board Hearing; ATC Hearing).

21. Any finding of fact may be considered a conclusion of law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Applicant, Garb-Ko d/b/a 7-Eleven Store #229, 5820 West 56th Street, Indianapolis, Indiana 46254, filed its application for renewal of a Type 116 ATC permit, Permit No. DL49-21523, on or about December 29, 2004. (ATC File).

2. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and § 7.1-2-3-9.

3. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

4. The Commission is authorized to act upon proper application. *Id.*
5. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).
6. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).
7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).
8. Applicant is a fit and proper applicant and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1.
9. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).
10. No evidence has been submitted which would disqualify Applicant from holding a Type 116 beer and wine permit at its 5820 West 56th Street, Indianapolis, Indiana 46254 location. (Local Board Hearing; ATC Hearing).
11. Although the rules of evidence are relaxed in hearings before an administrative agency such as the ATC, it does not follow that no rules of evidence apply. *Oriental Health Spa v. Forty Wayne*, 526 N.E.2d 1019, 1022 (Ind. Ct. App. 1988). Remonstrators' testimony that the

Applicant is not a grocery store within the meaning of Indiana law is a legal conclusion and is therefore inadmissible under Rule 704(b) of the Indiana Rules of Evidence.

12. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

13. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

14. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

15. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

16. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

17. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

18. Where an Applicant shows that competing stores located in close proximity to the proposed permit premises are selling alcohol, such evidence constitutes a desire to purchase the product. *Id.*

19. When Remonstrators cite to the deleterious impact to the community by sale of alcoholic beverages in opposing a permit, it goes to the impact of such services on the neighborhood or community. 905 IAC 1-27-4(d).

20. Where Remonstrators show that local residents and businesses are against issuance of alcoholic beverage permit at this particular location, such evidence constitutes a desire to not receive such services at that location. 905 IAC 1-27-4(b).

21. The beer and wine permit at the Store #229 will not negatively impact other businesses in the neighborhood or community. 905 IAC 1-27-4(c).

22. Viewed as a whole, the record demonstrates that the community does desire to purchase alcoholic beverages at Store #229. 905 IAC 1-27-4(b).

23. Substantial evidence shows that the issuance of the permit is in the public's best interest. 905 IAC 1-27-4(a); Ind. Code § 7.1-3-19-10.

24. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a substantial portion of the business carried on in the premises is in the nature of the applicant's main business function in the premises. Ind. Code § 7.1-3-1-19.

25. The Commission may issue a beer and wine permit to an applicant when a substantial portion of the applicant's business in the premises is in the nature of a grocery store. Ind. Code § 7.1-3-5-2; Ind. Code § 7.1-3-1-19.

26. The phrase "in the nature of the applicant's main business function" as applied in IC 7.1-3-1-19 to grocery stores means the retail sale of products typically found in an Indiana grocery store. *See Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

27. The term "grocery store," in common usage, means a building or structure in which groceries are kept for sale. *Goldstine v. State*, 103 N.E.2d 438-442 (Ind. App. 1952).

28. The word “substantial” as used in Ind. Code § 7.1-3-1.19 means something more than a nominal amount, something more than seeming or imaginary, but does not mean 50% or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

29. The phrase “in the premises” as used in Ind. Code § 7.1-3-1-19 means a building or part of a building in which alcoholic beverages are authorized to be kept or sold. Ind. Code § 7.1-1-3-20.

30. The Applicant has established that a substantial portion of its business in the premises is in the nature of a grocery store. (Local Board Hearing; ATC Hearing).

31. The Applicant has submitted substantial evidence that it, in fact, meets the character of business test for a grocery store and is qualified to hold an ATC permit. (Local Board Hearing; ATC Hearing).

32. Store #229 is a grocery store and thus qualified to hold a grocery permit. Ind. Code § 7.1-3-5-2.

33. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

34. To deny the application to Store #229 while granting other similarly situated applicants’ applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

35. The Local Board denied this application without sufficient evidence that would support a finding that this permit should not be issued. (Local Board Hearing).

36. The Commission may decline to follow the recommendation of the Local Board where the recommendation of the Local Board is not based on substantial evidence. Ind. Code § 7.1-3-19-11.

37. The Commission may reverse the Local Board's action in denying the application of a permit if it finds that the Local Board's decision was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. *Id.*

38. The Local Board's decision in denying the issuance of permit to the Applicant was (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. *Id.*

39. Any conclusion of law may be considered a finding of fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the recommendation of the Local Board in the matter of application of Garb-Ko, Inc. d/b/a 7-Eleven, 5820 West 56th Street, Indianapolis, Indiana 46254, Permit No. DL49-21523, was arbitrary and capricious, not based on substantial evidence and contrary to law and cannot be sustained. It is further ordered, adjudged and decreed that the evidence adduced at the ATC appeal hearing was in favor of the Applicant and against the recommendation of the Local Board. The appeal of

Applicant is hereby approved, the recommendation of the Local Board in this matter is reversed,
and the permit applied for herein is GRANTED.

Dated: _____

U-Jung Choe
Hearing Judge